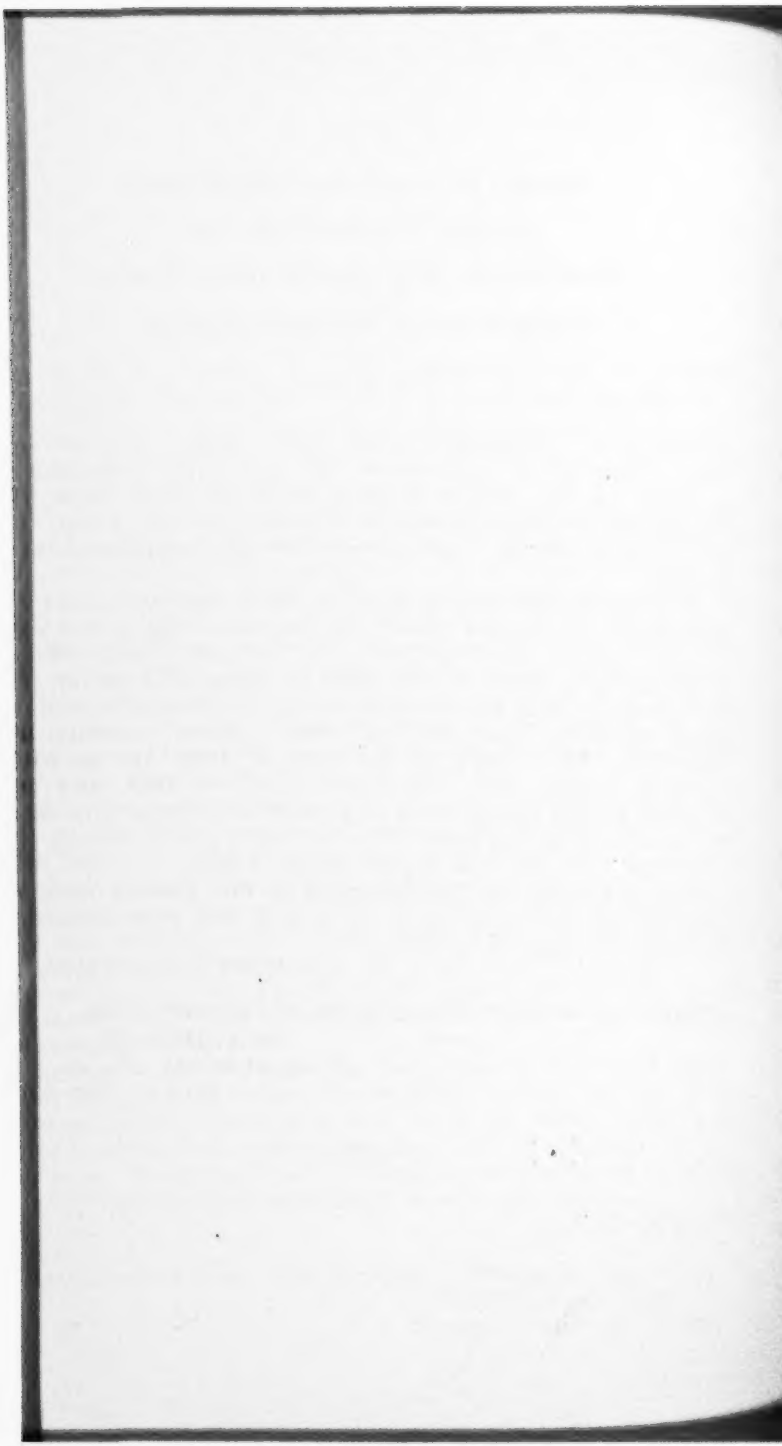


FILED
OCT 14 1904
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 26.

CLARENCE T. BIRKETT,
Plaintiff-in-Error,

vs.

COLUMBIA BANK,
Defendant-in-Error.

Brief for Defendant-in-Error.

JULIUS J. FRANK,
Attorney for Defendant-in-Error,
59 William Street,
New York.

APPEAL PRINTING CO., 15 Vesey St., New York. TEL. 1501 CORTLANDT.

United States Supreme Court.

No. 267, October Term, 1903.

CLARENCE T. BIRKETT,
Plaintiff in Error,
versus
COLUMBIA BANK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

Plaintiff below sued, in the Supreme Court of the State of New York in and for the County of New York, as the holder of a promissory note made by the firm of Russell & Birkett, of which defendant below is the surviving member. The answer, after expressly admitting the allegations of the complaint, sets up the discharge of said defendant's firm in bankruptcy, that the note in suit was duly presented and proved in said bankruptcy proceedings, and the plaintiff's claim thereon was released by said discharge (p. 4). On the trial the allegation that the note in suit was thus presented and proved was withdrawn (p. 11).

The said firm of Russell & Birkett on February 15, 1899, had made and delivered the note in suit to the order of the Manhattan Railway Advertising Company, promising thereby to pay on April 5, 1899, $750 (p. 6). Before maturity, said note duly became the property of plaintiff (p. 7), which, at the makers' direct request (Ex. 2, p. 14), extended the time of payment until April 12th, after they had unsuccessfully sought an extension through the intercession of the payee (p. 13, Ex. 1).

On the date of expiration of the period of extension the makers filed their petition in bankruptcy in the Northern District of New York (p. 14), and on April 15, 1899, they were duly adjudged bankrupts (Ex. A, p. 15). In the schedule filed with their petition the debtors stated that the name of the creditor under, and last holder of, this note known to them was the Manhattan Railway Advertising Company (p. 17, Ex. C); they omitted all mention of the name or address of the plaintiff and caused notice of their adjudication and to attend the first meeting of their creditors to be sent to said Manhattan Railway Advertising Company instead of to plaintiff (p. 12, Ex. D).

A jury having been waived, the Trial Court found, in addition to the facts alleged in the complaint, that prior to the maturity of the note the defendant and his firm, the makers of said note, had actual knowledge of the fact that the plaintiff was then the owner and holder of the same (p. 7); that said firm after such maturity were adjudicated bankrupts upon their own petition (p. 7); that the defendant was thereafter discharged in bankruptcy (p. 7); but that plaintiff's claim and the debt of defendant's firm and of the defendant to the plaintiff, upon said note, were not duly scheduled in time for proof and allowance with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof and the creditor of said bankrupt by reason thereof (p. 7); that plaintiff had no notice or actual or other knowledge of said proceedings in bankruptcy prior to the discharge of the bankrupts therein (p. 7); and that no notice of any of said proceedings was at any time given to the plaintiff, by, or by the direction of, said bankrupts or either of them (p. 7). The court also found, as conclusions of law, that the claim of the plaintiff upon said note was not and is not barred or discharged by the defendant's said discharge in bankruptcy, and that at the date of said decision there was due and owing to plaintiff from the defendant thereon the full amount thereof, with interest (p. 7).

The defendant having appealed from the judgment entered against him in the Trial Court (p. 8), the same was unanimously affirmed (p. 20) in the Appellate Division (65 App. Div., 615), and upon his further appeal, in the Court of Appeals, VANN, J., dissenting (174 N. Y., 112; Record, p. 23), whereupon he sued out a writ of error removing the cause to this court (pp. 30, *et seq.*).

POINTS.

I.

The writ should be dismissed or the judgment affirmed because of failure to transmit any assignment of errors with the record.

The record fails to comply with the requirements of R. S., § 997, and as no "plain error" appears therein the uniform practice of the court should be followed in this case.

Lucas vs. Brook, 18 Wall., 436.
Portland Co. vs. U. S , 15 *id.*, 1.
Ryan vs. Koch, 17 *id.*, 19.
Treat vs. Jemison, 20 *id.*, 652.
Maxwell vs. Stewart, 21 *id.*, 71.
Scholey vs. Rew, 23 *id.*, 331.
Rowe vs. Phelps, 152 U. S., 87.

United States vs. *Pena*, 175 U. S., 500, is not inconsistent with *Rowe* vs. *Phelps*, *supra*, and other earlier cases on the subject, as it merely reiterates the doctrine that the court is not *compelled* to dismiss for absence of assignment of errors, but "may, at its option, notice a plain error not assigned." But this is within the discretion and option of the court, and it would seem that the error must be so plain as to appear almost without argument to move the court to relieve the plaintiff in error from the explicit requirements of the Statute and Rule 21 (Subd. 4).

II.

The cause of action was not barred or discharged by the discharge in bankruptcy.

Subd. *a* of §58 of the Act provides that notices be sent to creditors, at

> "their respective addresses *as they appear in the list of creditors* of the bankrupt, or as afterwards filed * * * by the creditors."

But the Act makes it the duty of the debtor in order to enable the Referee to comply with this requirement, to file with his petition,

> "*a list of his creditors showing their residences if known*, if unknown that fact to be stated," &c. (§7, Subd. 8).

It is therefore, not inaccurate to say that in a sense notices sent in the course of the proceedings are sent by the bankrupt's "direction." It certainly should not be open to a bankrupt, who has failed to place the Referee in position to notify his creditor, to avail himself of his own default, to defeat payment of that creditor's claim.

The plaintiff in error claims that the Court has charge of the subsequent proceedings after the filing of the schedules. This also may be admitted. But it is to be noted that the defendant in error is not urging against the effect of the bankrupt's discharge any act or omission of the Court or Referee, but the deliberate omission of the defendant himself prior to the point of time when the Court took charge, and while the proceeding was still in his sole and entire control. If there was no burden upon the bankrupt to notify his creditors there was indisputably the duty to inform the court in the prescribed statutory manner who his creditors were, and where notices would reach them.

Finally the court, if necessary to sustain the judgment, will experience no difficulty in finding in the record sufficient

proof to support a finding that no notice was sent to plaintiff by the Court or Referee. There can be no question of the Court's power to do this.

Ogden v. Alexander, 140 N. Y., 356, 362.

The debtor himself testified that the only notice of which there was any proof offered, was sent not to plaintiff, but to a third party (p. 12, Ex. D, also Ex. C). Had it been possible to show notice also to the plaintiff below we may assume that proof of the fact would not have been lacking.

THE ACT OF 1898 SHOWS MARKEDLY THE INTENT OF CONGRESS TO MAKE ACTUAL NOTICE TO CREDITORS OF EVERY IMPORTANT STEP A CONDITION PRECEDENT TO THE BARRING OF THEIR CLAIMS AGAINST THE BANKRUPT.

The Act of 1841 (§7) required notice of meetings of creditors by publication only. The Act of 1867 (§11), while providing for such notice by mailing to each scheduled creditor, authorized the Court to dispense therewith, and substitute therefor notice by publication (Act of June 22, 1874, §5).

The Act of 1898 (§58*a*) *requires* notice by mail to each *scheduled* creditor, and permits of no *alternative* or *substituted* service, though publication is authorized *in addition to* mailing. In order to overcome the objection of possible disproportionate expense, the Referee is authorized in mailing notices to use a government penalty envelope dispensing with the necessity of paying postage.

Loveland on Bkcy., p. 98, n3.

The Act of 1867 (§28) prescribed no manner of giving notice of the filing of Trustees' accounts; required (§27) notice of dividends to be given only to creditors who had proved their claims; notice of application for discharge (§29) only to such as had proved their claims; and generally, as to all meetings after the first (§17) left the manner of giving notices to the discretion of the Court.

The Act of 1841 permitted all notices to be given by publication (§§4, 7, 10), discretion being vested in the Court to require personal notice in the case of applications for discharge.

Under the Act of 1800 the only prescribed method of notice was by publication (§§6, 29). In some instances, as in case of application for discharge, no notice is prescribed.

The Act of 1898, on the other hand, requires *notice by mail* of every step in the proceeding to every creditor *named in the schedule*, or who has otherwise become a party as stated in the Act. (Cf., §§58, 14 Subd. b., 39 Subd. 4, 59 Subd. d.). In contrast with the earlier Acts the *schedule* is made the basis of notification, and not the fact that the creditor has proven his debt.

The same policy and intent of the Legislature further appear upon a comparison of the provisions relating to the effect of the discharge of the bankrupt.

Under the Act of 1800 the discharge barred all debts which might have been proven against the bankrupt.

Under the Act of 1841 (§4), the discharge and certificate

> "shall in all courts of justice be deemed a full and complete discharge of all debts * * * of such bankrupt which are *provable under this Act* * * * and the same shall be conclusive evidence of itself in favor of such bankrupt"

unless impeached for fraud, etc.

The Act of 1867 (§34) made the discharge effectual to

> "release the bankrupt from all debts * * * *which were or might have been proved* against his estate in bankruptcy. It may be pleaded by a simple averment * * * as a full and complete bar to all suits brought on any such debts," etc. (U. S. R. S., §5119).

Under the Act of 1898 (§17) the discharge releases the bankrupt from *all his provable debts except such as* * * *

> "3. *Have* not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to

the bankrupt, unless such creditor *had* notice or actual knowledge of the proceedings in bankruptcy."

The use of the terms "*have not been*" and "*had*," signifying action *accomplished*, instead of the future or a subjunctive form, compels the conclusion, confirmed by the nice discrimination with which words of tense are employed throughout the section, that the due scheduling as well as the creditor's knowledge or notification which bring a debt within the operation of a discharge must *precede* the latter. The term "had" in the last clause of the subdivision reenforces this interpretation and is, in fact, inconsistent with any other. Whatever be the function of the phrase, "in time for proof and allowance," the failure to repeat it or to refer to it in the final member of the subdivision leaves that member unqualified by it.

It is plain that the phrase was added for the *creditor's*, not the bankrupt's, protection. Far from extending, it sets an additional limit to the time within which a debt must be scheduled to be discharged. Creditors have but a year after the adjudication within which to prove claims (Sec. 57, *n*), while the bankrupt may delay his application for a discharge until eighteen months thereafter (Sec. 14, Subd. *a*).

The bankrupt may, within the prescribed period, select his own time for instituting the proceeding for his discharge, and it depends on the record made by him who shall be notified thereof. The only logical and just construction, therefore, of the provision under consideration is that, as the effect of the discharge is immediate, its scope must be measured by the record *as it exists when the order is made*. The bankrupt, not the creditor, must take the risk of the state of the record, and it would be contrary to every dictate of equity and reason to bind by the discharge any creditor whose notice of the bankruptcy proceedings post-dated the order, unless he had *theretofore* been duly scheduled *within the period for proving claims*.

The entire Act shows the purpose to remedy an evil existing under the former Bankruptcy Acts, by no longer exposing the creditor to the hazard of substituted notice and giving him instead the benefit of direct and actual notice of the steps contemplated by the bankrupt in the prosecution of measures to escape the demands of creditors. The one single exception of which the Act gives the bankrupt the benefit, viz.: notice or actual knowledge to, or of, the creditor, notwithstanding the failure of the debtor to schedule his name and address, makes only more clear the intent of Congress.

Nor, in contradistinction to the former Bankruptcy Acts, is the creditor to be deprived of the opportunity to oppose the debtor's discharge even though the creditor may not have been sufficiently active in his own behalf to make proof of his claim. It is enough that he is a creditor and that the bankrupt knows him to be such, and his address. There is no presumption possible, under the Statute, that the bankrupt is ignorant in either particular, unless he says so in his schedules.

The wisdom of Congress is well shown by the facts at bar, which illustrate how easily a dishonest bankrupt, in collusion with an intermediate creditor (here the payee of the note in suit) may, while observing the forms of law, profit by the Act, even to the extent of securing to himself the payment of dividends through such intermediate creditor in fraud of the real creditor, whose name and address he knows, and from whom he deliberately conceals all knowledge of the proceedings by the simple device of causing all notices to be sent to his confederate. If this can be done through an intermediate payee, it can be done through one who has assigned his claim without recourse, or even through an entire stranger—depending entirely on the elasticity of the bankrupt's conscience; and if it can be done as to one claim against the bankrupt, why not as to a larger number, if absence of creditors or other circumstances should seem to make such a course safe from detection until after the distribution of the estate and the discharge of the bankrupt?

Upon the theory of plaintiff in error final success would be assured by conveying knowledge of the bankruptcy to the defrauded creditor *a day before the expiration of the time for proof and allowance of his claim.*

Plaintiff in error urges that there is no suggestion that defendant has been deprived of any substantial right. It would seem that the absence of such deprivation should be proven by the defendant. But, waiving this, the creditor *has been deprived* of the right and opportunity to participate in the selection of a trustee (Bank'cy. Act, §44); to examine the bankrupt (*id.*, §7) and to oppose the application for his discharge (*id.*, §14). It has lost the benefit of the first meeting of creditors, and the opportunity to participate in all the other proceedings for which notice is prescribed in §58 as the creditors' absolute right "unless they waive notice in writing." Possibly the only dividend declared by the estate was paid before the plaintiff's discovery of defendant's bankruptcy. Presumably, if there was a dividend, it was paid to the Manhattan Co., falsely scheduled by the defendant as the owner and holder of the plaintiff's note. What "substantial right" was then left to plaintiff? The defendant replies, the right to move to set aside the discharge. But even in this respect the plaintiff is at a serious disadvantage: While the plaintiff, if notified as contemplated by the Statute, could have examined the bankrupt at such length and with such latitude, as the act permits (§7, Sub. 9, §21, §58, §9b), and would thus have been able to learn whether facts existed warranting the withholding of a discharge, and available in opposition to an application therefor, it could, after its discovery of its debtor's bankruptcy, urge the revocation of the discharging order only if prepared to establish affirmatively "upon a trial" that "it was obtained through the fraud of the bankrupt," in addition to the other facts which prior to the discharge would alone have been sufficient to defeat the bankrupt's application (§15). Assuming as we must, the absence of fraud in obtaining the discharge, the plaintiff would

thus be forever barred and deprived of any and all benefits of the bankruptcy proceeding.

If the reasoning of the plaintiff in error be sound it is applicable to a case where a creditor, from whom the bankrupt has deliberately kept all knowledge of his bankruptcy, casually discovers the fact on the eve of the expiration of the time in which he might have proven his debt, or made application to set aside the discharge! This *reductio ad absurdum* plainly reveals the fallacy of the argument, and the untenability of the position of the plaintiff in error.

Such a construction of the Act, substituting notice at a time when it cannot be practically availed of, for the statutory notice affording ample opportunity for hearing (§58), would be contrary to reason and justice, and would deprive the creditor of his property without "due process of law" as defined by EARL, J., in *Stuart v. Palmer*, 74 N. Y., 183, 191, as follows:

> "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

In the same case it was said (p. 188):

> "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must *require* notice to them and give them the *right* to a hearing and an opportunity to be heard."

Cited with approval in Montana Co. vs. St. Louis Co., 152 U. S., 160, 169.

In the face of Exhibits 1 and 2, and with no suggestion of any fact in the Record to sustain it, there can be no attempt to excuse the failure to schedule the note in the name of the true owner and holder thereof worthy of serious consideration.

The coincidence of the filing of the petition in bankruptcy with the date of expiration of the extension obtained from the plaintiff on the faith of the debtors' promise positively to pay their debt made on the very eve of their bankruptcy, and plainly with no intention of performance (Ex. 1), together with the lame and disingenuous attempt to break the force of this damaging fact (p. 15) warrant the finding of wilful and even fraudulent omission of plaintiff's name from the schedules, which, even under the Act of 1867, would have "prevented the operation of the discharge on the claim held by the omitted creditor."

Poillon v. Lawrence, 77 N. Y., 207.
Batchelder v. Low, 8 Natl. Bank. Reg., 571, 572.
Matter of Kalish, Deady, 575.

The Trial Court found (p. 7), *and the finding neither was nor could be challenged or questioned*, that the bankrupts knew that the plaintiff was the owner of the note in suit before they filed their petition and schedules, notwithstanding which they deliberately falsified the fact in their schedules (Ex. C), thus keeping all notice of their bankruptcy from the plaintiff (p. 12).

In *Batchelder v. Low* (*supra*), the court, per WHEELER, J., said, p. 572:

> "It is a fundamental principle in relation to judicial proceedings that all persons between whom such a proceeding is pending must have proper notice of, and opportunity to be heard in, it before any judgment can be rendered upon it that will bind them. The Bankrupt Act recognizes this rule of law, and, in accordance with it, requires the bankrupt to annex a schedule of the debts he owes and the names of the persons to whom due, to his petition * * * The schedule is the sole foundation for personal notice of the proceedings at any stage of them to the creditors who are not already parties * * * The defendant, therefore, by the schedule annexed to his petition, and sworn to by him, furnished the only basis for personal notice direct to the creditors against whom he

was proceeding to obtain this judgment of discharge. If he omitted this note (the claim in suit), and the name of the person to whom it was really due, he kept the foundation for notice of the proceedings to these persons away from the Court of Bankruptcy. If he did that fraudulently, and by that means they failed to receive notice, then he fraudulently deprived them of the notice of, and of the opportunity to be heard upon, the proceedings which they were entitled to * * * This is not an ordinary judgment. * * * But although peculiar in form and effect, it is an adjudication upon proceedings *upon which all parties interested should have all the notice which the law provides for them;* and when the party procuring it fraudulently deprives such parties of all direct notice that the law entitles them to, and proceeds to judgment without such notice to them, the judgment, such as it is, although it may be valid to all persons who had notice, should be void as to those who did not."

In *Tyrrel vs. Hammerstein*, 33 Misc. (N. Y.), 505, cited by the Court below (p. 9), we have a parallel case. It was there said by McADAM, J.:

"The next defense is a discharge in bankruptcy granted by the United States District Court, whereby the defendant was discharged from all provable debts and claims which existed against him April 10, 1899, on which day his petition for adjudication was filed. The plaintiff's cause of action existed January 21, 1898, but he claims it was not discharged, because it was not entered upon the schedules filed, and he was not recognized as a creditor in the proceeding. This is founded on Section 17 of the Act of 1898, which expressly excepts from the operation of the discharge debts which 'have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.' See also Collier Bank. (3d Ed.), 197, 198.

"Under the former Bankruptcy Act, which contained no such exception, the discharge was a bar, even though the creditor owning the demand was omitted from the schedule and received no notice of the proceeding, pro-

vided such omission was not wilful or fraudulent (citing cases). The most pertinent inquiry, therefore, is, what was the defect in the former provision that Congress intended to remedy by the new one, for we must hold that the amendment was not made without a substantial purpose. *The change most clearly indicated is that where the creditor has neither knowledge nor notice of the bankruptcy proceedings, his debt, if not duly scheduled, with his name, if known to the bankrupt, is not to be discharged, whether the omission is fraudulent or otherwise.* This would seem to be the application by Congress to bankruptcy proceedings of the familiar constitutional principle that 'due process of law' intended to deprive one of property contemplates notice of some kind to the party whose property is to be taken that he may have his day in court and to be heard before the court adjudicates against him (Cooley Const. Lim., 3d Ed., 353). *The plaintiff knew nothing of the bankruptcy proceedings until after the discharge*, while the defendant, as well as his agents, knew of the plaintiff's claim, so that there was no good reason for omitting it from the schedules. * * * The defendant had no right to altogether ignore the plaintiff and *his* demand, unless he intended, as the Act proclaims, that the plaintiff should not be bound by the proceeding in which he was so ignored. The plaintiff is, therefore, entitled to judgment."

The main point on which this decision turned was the failure of the bankrupt to give the court the information necessary to enable the referee to give notice to his creditor. That *the existence of the debt*, as well as the name of the creditor, was concealed does not add conclusiveness to the reasoning of the court, or make the decision less applicable to the case at bar.

III.

The discharge was insufficiently pleaded, and the facts proven in support of the answer did not sustain the defence.

It is well settled that where a party claims the benefit of a statute as a release from an otherwise valid and existing indebtedness, he will be held to strict pleading, and that, where such statute contains an *exception*, he must not only strictly plead the statute, but with equal strictness plead facts *negativing the exception.*

1 Kent Com., 463.
Harris v. White, 81 N. Y., 532, 538-9, 546-7.
Jones v. Axen, 1 Ld. Raym., 119, 120.
Spieres vs. Parker, 1 Term R., 141.

"A proviso differs from an exception. An exception exempts, absolutely, from the operation of an engagement or enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something that would otherwise be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse."

Bouvier's Dictionary.

In *Sedgwick, Constr. St. & Const. Law*, p. 50, it is said:

"There is a well known distinction between an exception in the purview of the Act and a proviso. If there be an exception in the enacting clause of the statute it must be negatived in pleading; but a separate proviso need not."

See also Potter's Dwarris on Statutes, p. 119.

In *Rowell vs. Janvrin*, 151 N. Y., 60, it was said per O'BRIEN, J., at p. 66:

"In stating a cause of action arising upon a statute, it is an ancient rule that where an exception is incorporated in the body of the clause of the statute, he who pleads

the clause ought to plead the exception. But where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause and leave it to his adversary to show the proviso. (Jones v. Axen, 1 Ld. Raym., 120.) This rule of pleading has been followed and applied in a great variety of cases arising upon statutes and contracts to this day."

Moreover the facts relied upon to warrant the application of the excepting provision as matter of law

"must appear to be conclusively established by some affirmative finding."

Peo., &c., vs. Scannell, 172 N. Y., 316, 321.

Subd. 3 of §17 of the Act of 1898 is explicitly termed, and manifestly creates, an *exception* to the otherwise universal operation of the discharge. As such it must be negatived by pleading and proof. The answer fails entirely to do this. There is neither averment nor proof that the debt in question was duly scheduled, with the name of the creditor (plaintiff) or that plaintiff's name was not known to the bankrupts or that plaintiff had notice or actual knowledge of the proceedings in bankruptcy. The allegation in the answer that the note in question was presented before the Referee, in the absence of an averment that *plaintiff* presented it, did not cure the defect under discussion, and on the trial was abandoned (p. 11). The remaining averments as to the effect of the discharge are merely conclusions of law.

This point was seasonably urged by motions for judgment on the answer, both on the opening and the close of the case (pp. 11, 15).

IV.

The burden of proof was throughout on the defendant.

This follows necessarily from the proposition considered under Point III, and from the provisions of the New York Code of Civil Procedure.

The plaintiff's entire cause of action was admitted by the answer, which opposed thereto merely an affirmative defence (p. 4). Under the New York system of pleading no reply was required or permitted to this defence, unless ordered by the Court on defendant's application.

The provisions governing the subject are the following:

"§514. *Reply; what to contain.* Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim."

"§516. *Cases where the Court may require a reply.* Where an answer contains new matter, constituting a defence by way of avoidance, the Court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter."

"§522. * * * But an allegation of new matter in the answer, to which a reply is not required, * * * is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires."

"§532. *Judgment; how pleaded.* In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction."

By virtue of these provisions the allegations of the defendant's discharge stood as controverted and the defendant was bound to establish the same fully, including "the facts conferring jurisdiction."

V.

The defendant did not sustain the burden of proof.

In addition to other shortcomings in the proof pointed out under Point III the defendant made no attempt to show any facts conferring jurisdiction on the Court in which he claimed

to have received his discharge. The copy of the Order for Discharge introduced in evidence (p. 16, Ex. B), is not certified, and was not described as being certified when offered (p. 11). It therefore lacks the probative force with which the Act clothes a "*certified copy* of an order * * * granting a discharge" (§21, subd. *f*). As the Act is in derogation of the common law, it must be strictly construed, and defendant must be held to a literal compliance with its provisions. Even the production of the original order, had that been possible, would not have answered the requirements of the rule of evidence created by the Act and invoked by the defendant.

The defendant made no request of the Court to find, and the findings do not show, that plaintiff had notice or actual knowledge of the proceedings in bankruptcy *at any time.* There is therefore *no finding or request to find improperly refused, that it had such knowledge in time to prove its claim and have the same allowed.* This alone is enough to dispose of the entire argument of plaintiff in error in so far as it rests on this assumed fact, it being settled that no fact can be considered by the Court of Appeals of New York for the purpose of *reversing* a judgment unless it is either found or requested to be found on uncontroverted evidence.

Koehler v. Hughes, 148 N. Y., 507, 515.

This rule is applied generally in Courts of review including this court.

It is further settled in this court that

> "Whatever was matter of fact in the Court whose judgment or decree is under review is matter of fact here."

per MR. JUSTICE MCKENNA, in

Eastern Building & Loan Assoc'n vs. Ebaugh, 185 U. S., 114, 121.

Citing

Hawley vs. Donoghue, 116 *id.*, 1;

and that the findings of fact in the lower court are conclusive in this court.

Minneapolis, &c., R. Co. vs. Minnesota, No. 138, Oct., 1903, Term.
Mining Co. vs. Land Co., No. 76, *ibid.*
Thayer vs. Spratt, 189 U. S., 346, 353.
Jenkins vs. Neff, 186 *id.*, 230, 235.
Western Un. Tel. Co. vs. Call Pub. Co., 181 *id.*, 92, 103.

In *Dooley* vs. *Pease*, 180 *id.*, 126, this court said at p. 131, by MR. JUSTICE SHIRAS:

> "Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Citing Stanley vs. Supervisors, 121 *id.*, 547.

This court, therefore, will assume the correctness of the Ninth finding to the effect that the claim in suit was

> "not duly scheduled in time for proof and allowance," &c. (p. 7).

In the absence of any finding, or request therefor, that plaintiff had such notice or knowledge as alone would relieve the bankrupt from the effect of this omission, and make the discharge binding on the plaintiff it is legally impossible that the defence can succeed in this court.

VI.

The authorities cited in the learned dissenting opinion in the Court of Appeals are distinguishable, and are not inconsistent with an affirmance of the judgment under review.

Fider vs. Mannheim, 81 N. W. R., 2, is most nearly in point on the facts, and on it the plaintiff in error relied most strongly in the State Courts. That case may be conceded to

have been well decided on the facts. It is parallel to the case at bar to the extent that the defendant before filing his petition knew the plaintiff to be his creditor and did not schedule him as such. It is radically different in the facts, that within less than a month after the filing of the petition (we quote from the opinion)

> "plaintiff knew that the defendant had gone into bankruptcy and *had not then been discharged.* Plaintiff admitted repeatedly * * * that he was informed of the fact early in November *by defendant* and others. * * * He also had ample time thereafter in which to prove his claim if he desired to do so, and have it allowed, as the *judgment of discharge was not entered until the following May.*"

The court indicate plainly that they would not have considered the knowledge acquired by the creditor to have been sufficient if he had not had it in time "for proof and allowance" of his claim *before the bankrupt's discharge.* The fact that during six months he might have actively intervened in the proceedings in the Bankruptcy Court evidently controlled the court's decision, which perhaps was not entirely uninfluenced by the fact that the omission of the creditor's name from the schedules was clearly an inadvertence, which the bankrupt took care to correct almost immediately by personal notice to his creditor.

The court, as a matter of ordinary justice, refused to allow the creditor deliberately to ignore proceedings of which he had knowledge in ample time for all practical purposes, which the statute therefore made binding on him, and the effect of which he was endeavoring to escape by insistence on a technical and harmless oversight on his debtor's part.

In the case at bar, however, we have the converse of that case: a deliberate concealment by the debtors of the pendency of all proceedings from the creditor, and their prosecution to the order of discharge admittedly without any notice to, or knowledge by it. If it be assumed that plaintiff here ac-

quired such knowledge within the statutory time for merely proving its claim, the equities would still be with the plaintiff, and the defendant would be in the position of unfair and unjust insistence on a technicality, in which the plaintiff was in the cited case. But, as already pointed out there is no such finding, and this court cannot find or assume that the plaintiff *at any time* acquired knowledge of the defendant's bankruptcy. The cited case, therefore does not apply.

Sherwood vs. Mitchell and *McCabe vs. Cooney* arose under the Act of 1841 and under a system of pleading no longer in vogue in New York. They turned largely on the fact that that Act created exemptions from the effect of a discharge in bankruptcy by "provisos," to which we have already drawn attention (Point III).

In *Brown vs. Broach*, on demurrer the court suggested (p. 541, and apparently *obiter*), that (syllabus),

> "It is bad pleading to aver in the declaration the grounds relied on to avoid a discharge in bankruptcy. Such matter should be set up in the replication to the plea of discharge."

Brereton vs. Hull seems to have been disapproved in *Caryl vs. Russell*, 18 Barb., 429.

Johnson vs. Ball and *Cutter vs. Folsom* are inapplicable because the question presented arose under the *provisos* of the Act of 1841 and involved considerations inherent in the forms of pleading in use in New Hampshire and which find no analogy in the Code system in New York.

Harrison vs. Lourie was decided at *nisi prius*. As the Bankruptcy Act of Great Britain, under which the question adjudicated arose, is not set out in the report of the case, it is not possible to tell to what extent, if any, the case sustains the proposition to which it is cited.

Chapman vs. Forsyth: A reading of the third question (2 How. U. S., 203) and of the entire answer thereto (*ibid.*, 208-9), the final paragraph of which only is

quoted at p. 29 of the Transcript of Record, makes it somewhat difficult to discover the appositeness of the cited case.

In *Stevens vs. King*, the only question raised as to the discharge in bankruptcy related to its admissibility in evidence in defendant's behalf, although

> "it was not shown that the plaintiff was a party to the bankruptcy proceeding and received notice thereof" (p. 378).

No such question is presented here. On the other hand, if the cited case correctly states the law the plaintiff at bar has complied with the conditions laid down by the learned court by showing "some cause why the decree of the court was not effectual" as to it. In this respect, in fact, the plaintiff has met even the requirements of the dissenting opinion herein in the Court of Appeals (p. 29).

Loveland on Bankruptcy discussing the effect of the discharge under the present and prior Acts says (§299, p. 639):

> "A creditor whose name has been omitted from the schedule, and who has had no notice or knowledge of bankruptcy proceedings, has not such an interest as will enable him to institute proceedings to vacate a discharge. The reason for this is that his debts are not effected by the discharge."

JULIUS J. FRANK,
Attorney and Counsel
for Defendant in Error.

Washington, April, 1904.

Supplemental Memorandum.

This memorandum is addressed to so much of the brief of plaintiff in error, filed April 29th, 1904, as may not have been sufficiently anticipated in our foregoing brief, filed April 26th, 1904.

VII.

The following statements of facts are not supported by any findings in the record.

> "The Columbia Bank had actual knowledge of the bankruptcy proceedings in time to prove their claim and have it allowed" (pp. 3 and 9).
>
> "The Columbia Bank had actual knowledge of the bankruptcy proceedings on or about 17th November, 1899" (p. 4).

The effect of the absence of such findings has already been pointed out (Point V, *supra*).

The following statements are neither supported by findings, nor by proof of any kind:

That the defendant in error had knowledge of the proceedings in bankruptcy in time "to obtain his dividends" (pp. 15, 20).

That the defendant in error

> "made no effort whatever to avail itself of the provisions of the Bankruptcy Law" (p. 18).

That there was no fraud in this case and the trial court refused to find any fraud (p. 19).

That

> "the Columbia Bank still has its remedy against the Manhattan Railway Advertising Company on its note" (p. 19).

That any of the things summed up in the statement: "This is what was undoubtedly done in this case" (p. 20) was done. These alleged occurrences are the merest assumption, for which there can be no room even by way of argument, when Exhibits 1 and 2 are borne in mind. On the other hand it is entirely within the range of probability that the bank lost its remedy against the payee and endorser by granting an extension directly to the makers (Transcript of Record, p. 14, original p. 26). There is no proof that the bank ever took the steps necessary to hold the endorser by presentation and protest of the note at maturity. If presumptions are permissible, the mere fact of the bringing of this action under the circumstances would seem to indicate that the holder of the note no longer had any remedy against the endorser.

The statements on page 15 as to failure to offer evidence by the defendant in error, on which to base its claim to the benefit of the exceptions in Section 17, while literally true, may be misleading unless it is remembered that such evidence was introduced by the plaintiff in error upon his examination by his own counsel (Transcript, 12, Original, 23, Finding X, page 7, Original 14).

VIII.

The plaintiff in error apparently assumes (p. 4) that he can in a brief supply the omission from the Record of Assignments of Errors. We submit that this is in no sense whatever a compliance with the plain requirements of the statute and that there is no authority permitting the amplification of the record in any such manner (Point I, *supra*). Rule 21, 2 (2) presupposes a compliance with the statute.

IX.

The complaint of the plaintiff in error (p. 14) as to the unreasonableness of burdening the bankrupt with proof of the steps leading to his discharge "every time a creditor chose to

attack his discharge" is irrelevant. There is here no attempt to "attack" the discharge. The defendant in error, assuming the validity of the discharge, and even, *arguendo*, that it has been properly proven, contends that it does not affect the claim in suit because of the bankrupts' deliberate omission to make their creditor a party to the bankruptcy proceedings. It may well be that this discharge is binding upon each and every creditor of the bankrupts, other than the Columbia Bank. The bankrupts, however, had the option so to conduct those proceedings as to leave the claim of Columbia Bank entirely unaffected thereby. Whatever the motive may have been, whether honest or dishonest, they seem to have elected thus to proceed. Having done so, they cannot now claim that the effect of the discharge shall be precisely the same as though they had, in the full performance of their duty to all of their creditors, including the Columbia Bank, taken such steps as would have given the bank an opportunity to be heard at the various stages of the proceeding—to have its day in the District Court.

Whatever may be said by counsel in their brief, or in the authorities cited by them, as to the conclusiveness of proceedings *in rem*, it cannot be successfully contended that such proceedings may be conducted without regard to regularity of practice, or that the rights of parties interested therein can be thereby affected when they have not been conducted in strict conformity with all the requirements of law.

Plaintiff in error has been at great pains to refer to numerous provisions of the Bankruptcy Act in a labored attempt to prove that actual knowledge of the bankruptcy proceedings, at any time within the year permitted for the allowance of claims, is sufficient to make the bankrupt's discharge binding on the creditor having such knowledge.

We submit that these references only serve to illustrate the soundness of the position taken under our Point II, *supra*, and to strengthen the conviction that the construction of the Act for which plaintiff in error asks would pervert the statute

by enabling dishonest and designing bankrupts to use it as a weapon, instead of a shield. As already pointed out, it is impossible to adopt the reasoning of the plaintiff in error without holding, as an absolutely logical and necessary conclusion, that no matter how infinitesimal the time remaining between the creditor's obtaining knowledge or notice of the bankruptcy proceeding and the expiration of the period for proof and allowance of his claim, the discharge, obtained without notice to the creditor, will preclude him from any remedy against his debtor, even although it appear that, as a matter of physical possibility, there be not sufficient time for the bare ceremony of filing his claim for proof and allowance, and that meanwhile the entire estate has been distributed.

It would seem that the mere statement of the proposition most strongly shows its unsoundness.

The entire argument of the plaintiff in error assumes that the Bankruptcy Act was passed solely for the benefit of the debtor and imposes *duties* only upon the creditor. This idea finds expression in so many forms that it is unnecessary to cite particular passages in which it is embodied. The fallacy of the assumption need not be pointed out. Even though we agree that a most important purpose of the Act is to attain the application of the bankrupt's estate to the discharge of his indebtedness (p. 17), it must not be forgotten that the Act intends that the bankrupt's estate shall go, not to a few, *but to all* of the creditors, and that its beneficial results to the bankrupt depend upon, and are to follow only, a full, complete and absolutely strict compliance by him with its requirements and a punctilious discharge of all the duties which the Act imposes upon him from the very inception of the proceeding until his final discharge. The courts certainly never intended, in construing the Act as a remedial statute, to hold that the creditor should be deprived thereby of his remedies against his debtor, in other words of his property, in a case where the debtor in seeking the protection of the

Act, has wilfully done what he could to prevent the creditor's availing himself of such of its provisions as were devised to safeguard his rights. Such a construction would be contrary to the entire scheme and purpose of bankruptcy legislation.

X.

Authorities cited by plaintiff in error and not already considered in our principal brief.

Under Point II, page 11.

Jones vs. Walker decides nothing more than that on demurrer a petition sufficiently sets up proceedings under the Bankrupt Act in bar of an action to enforce a claim,

"if it be clearly shown that the creditor has actual knowledge of the application for the discharge in bankruptcy by the debtor and the pendency of the proceedings."

In *Zimmerman vs. Ketchum* the defendant answered, setting up his discharge in bankruptcy and, among other facts, plaintiff's appearance in the Bankruptcy Court including the proceedings for the discharge. Upon demurrer the answer was held to be sufficient, because it specifically alleged actual knowledge by the plaintiff, and his active participation in the bankruptcy proceedings, these facts being held equivalent to the scheduling of the debt under the Act.

It is not without interest to note that in this, as well as in the last preceding case, counsel did not think it sufficient to plead in general terms the granting of the discharge without specifically showing that the debts sued upon did not come within Exception (3) of Section 17 of the Act.

In *Smith vs. Wheeler*, the proposition to which the case is cited by plaintiff in error, was not even in the remotest degree involved, the only question there being whether "the claim of the plaintiff was a provable debt within the meaning of the Bankrupt Act."

Lamb vs. Brown arose under the Act of 1867, upon general demurrer to a replication to a plea of discharge in bankruptcy. Even if the point there decided were more nearly analogous to the questions here under review, the differences between the Act of 1867 and that of 1898 would suffice to render this decision inapplicable to the case at bar.

Carey vs. Mayer, involved only the question whether, under the Act of 1867, certain claims were provable in bankruptcy and therefore affected by the bankrupt's discharge.

White vs. How: Upon demurrer to a plea of discharge in bankruptcy under the Act of 1841, *held*, that the plea was sufficiently set out in accordance with the provisions of that Act.

Lathrop vs. Stewart involved the same question as *White vs. Howe*, *supra*, and was decided on the authority of that case.

Under Point III, pages 12–15.

Livingston vs. Oaksmith, decided in 1861 at Special Term, has no bearing, because the decision involved provisions of the State Insolvency Law, not analogous to the Bankrupt Act and of the Code of Procedure which are no longer in force in the State of New York, having been supplanted by the Sections of the Code of Civil Procedure set forth under Point IV, *supra* (p. 16).

In *Schermerhorn vs. Talman*, it was sought to avoid the effect of proceedings in bankruptcy under the Act of 1841 by alleging that the petition in bankruptcy was not sworn to before an officer authorized to administer oaths. The Court, while admitting that a party might attack the jurisdiction and affirmatively show that the proceedings were not had before officers duly authorized to act therein, sustained the regularity of the proceedings in question because of the absence of such affirmative showing and with the aid of a pre-

sumption that the Clerk of the Court would not do an unlawful act.

In *McCormick vs. Pickering*, defendant having pleaded a discharge in bankruptcy under the Act of 1841, in connection with which the proceedings leading up to the discharge were very fully set forth, and plaintiff having demurred to the plea for insufficiency, the court sustained the plea upon the ground that the facts pleaded showed a sufficient compliance with the requirements of the Act so as to confer jurisdiction on the bankruptcy court, which must thereafter be presumed to have acted with regularity.

In *Morse vs. Cloyes*, objections to the admission in evidence of a discharge in bankruptcy under the Act of 1841 were overruled on the ground that under that Act the bankruptcy court must be presumed to have had jusisdiction to grant the discharge until the contrary appears.

Small vs. Graves: A comparison of the state insolvency law, under which this case was decided and which is referred to in the quotation from the opinion on page 13, of the brief, will sufficiently show the inapplicability of the cited case, as authority here. Moreover, the fact of "intentional omission" of plaintiff's name from his schedules would deprive plaintiff in error of the aid of the cited case, even if otherwise parallel to the case at bar.

In *Hall vs. Robbins*, the Court, in sustaining the defence of a discharge under the insolvency laws of Massachusetts notwithstanding the omission of plaintiff's claim from the defendant's petition, such omission having been *admittedly* neither wilful nor fraudulent, did so because the insolvent (defendant) "had in all things conformed to the directions of such law." This case was decided in 1871, at which time the Massachusetts statute did not except from the bar of a discharge claims omitted from the debtor's petition or schedule of creditors. In 1897 the Massachusetts law was amended so as to except claims thus omitted. It is, of course, self-evi-

dent that no such analogy existed between the provisions of the Massachusetts Act of 1871 and the Bankruptcy Act of 1898 as to make the cited case of any importance upon the questions now before the court.

Rayl vs. Lapham turned upon the effect of proceedings in bankruptcy under the Act of 1867, had in strict compliance with the Act, as notice to a creditor endeavoring to assert his claim, notwithstanding the debtor's discharge in bankruptcy. Our comparison (Point II, *supra*), of the provisions of the Acts of 1867 and 1898, with reference to notice to creditors, sufficiently shows that the cited case is distinguishable. In fact it is unnecessary to do more than read the quotation from the opinion of the Court, on page 13 of our adversary's brief, to make this clear, especially if the quotation which plaintiff in error has cut short in the middle of a sentence be continued as the same appears on p. 458 of the report, as follows, a comma taking the place of the period appearing in the brief:

> "when he is found to have honestly complied with the requirements of the Act. If, by wilfully making false schedules or affidavits, he prevents notice to a creditor, his discharge may be annulled for this as well as for any other of the fraudulent acts enumerated in the 29th Section."

There is this further distinction to be observed in considering the decisions under the Act of 1867:

§34 of that Act provides that the discharge shall

> "with the exceptions aforesaid release the bankrupt from all debts" etc.

The "exceptions" are set forth in §33.

§29 provides that for certain causes a discharge shall be refused.

Excepting for §§29 and 33, the discharge is *absolute as to all provable debts.*

Neither of these sections except from the operation of the discharge a debt which has not been scheduled, or

the claim of a creditor not a party, and having no knowledge of the proceeding.

Per contra, §17 of the Act of 1898, as already pointed out, *expressly excepts* all such claims from the discharge.

In *Jarecki Mfg. Co.* vs. *McElwaine* (Brief, page 15) plaintiff having demurred to defendant's plea which set out, in considerable detail, proceedings resulting in a discharge in bankruptcy, the court, in overruling the demurrer, say (italics ours):

> "In the determination of this demurrer the Court must assume that every step in the bankruptcy proceedings, prior to and at the time of the adjudication of discharge, was in all respects regular and in compliance with every requirement of the Bankruptcy Act. It must therefore *assume that notice was given to the* individual and partnership *creditors of the bankrupt*," etc.

It may be fairly inferred that upon a state of facts showing this presumption of notice to be without foundation, the court would have denied the efficacy of the discharge to bar the plaintiff's claim.

Under Point IV, page 17.

Shawhan vs. Wherritt: Without drawing attention to the many other particulars in which this case could be distinguished from the one at bar, it is sufficient to say that the case arose under the Act of 1841, and the court having found that "the public notice required by the act having been given," *held* that "the creditors must be treated as having notice of the proceedings and an opportunity to make their objections to them."

In re Watts is so utterly wide of any and every proposition here involved as to require no further comment.

Washington, October, 1904.

JULIUS J. FRANK,
Counsel for Defendant in Error.